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GUARDING RELIGIOUS MINISTRIES FROM LEGAL ATTACKS

I. Overview

A. Key Questions Presented

- How can churches, religious schools, and ministries best protect their rights to operate according to their religious beliefs?
- What steps can these ministries proactively take today to protect their legal rights to operate according to their religious beliefs?

B. Today's Workshop

- This workshop will explore the rights and protections that faith-based organizations have against government interference and how churches, religious schools, and can live out their religious mission.
- Included in this session will be practical steps that these organizations can take to guard themselves from legal attacks in an ever-increasing hostile culture.
- Guidance will be provided to help ministries review and revise their governing documents to maximize their freedom to operate according to their beliefs.

C. Introduction

1. First Liberty Institute

- FLI is a nationwide, nonprofit law firm dedicated to protecting religious freedom for all Americans, at no cost to our clients.
- FLI has helped hundreds of organizations, including, religious nonprofits, charities, schools, and other ministries implement policies and procedures designed to maximize their rights under the law, and shielding them from unforeseen legal threats and challenges.

2. Jeff Mateer

- I am a litigator who has been practicing law for over 32 years in private practice at big Dallas law firm and then boutique litigations firms, government service, serving as First Assistant Attorney General of Texas, and non-profit, public interest law.

- I've served as a board member and President of Heritage Christian Academy in my hometown of Rockwall, Texas.
 - I am currently serving on the Board of Directors of Human Coalition, a national pro-life organization, serving women, children, and the unborn.
3. Disclaimer
- Today's workshop provides general guidance to assist religious organizations in responding to current legal threats to religious freedom.
 - It is not to be used as a substitute for legal advice from a licensed attorney.
 - If you have a legal question or need legal advice, please contact an attorney.
 - First Liberty Institute's attorneys may be contacted by requesting legal assistance at FirstLiberty.org.

II. A Cautionary Tale: The Parable of Two Christian Schools

- A. **A \$500,000 Mistake:** *Kelly v. Christ Academy*, Civil Action No. 7:11-cv-0072-O (N.D. Tex. 2012)
- In 2011, a Christian school's headmaster and its development director sued the school for gender discrimination and retaliation claims.
 - The Christian school failed to assert in its pleadings or at trial the ministerial exception defense which would have barred the claims.
 - Instead, the case went to trial, and while the school prevailed on some claims, the jury found that the school had retaliated against its former headmaster for engaging in activity protected by the employment laws and awarded damages.
 - After the entry of the jury's verdict, the school attempted to assert the ministerial exception defense, which the Court rejected as untimely.
 - First Liberty filed an amicus brief at this stage, which the Court found "extremely persuasive."
 - In the end, the Court entered a Final Judgment awarding the former headmaster \$161,850 in damages.
 - Her attorneys then sought over \$315,000 in attorneys' fees and over \$20,000 in costs.
 - The case settled confidentially.

- B. **A School Protected: *Samford v. Heritage Christian Academy* (EEOC 2012)**
- Also, in 2011, a Christian school terminated a teacher and coach, who became pregnant outside of marriage.
 - The teacher retained legal counsel and eventually filed a Charge of Discrimination with the EEOC.
 - The school retained First Liberty.
 - In response to the EEOC Charge and at a mediation, we asserted:
(1) the First Amendment’s Ministerial Exception bars the teacher’s discrimination claim,
(2) Title VII provides a statutory exemption to religious organizations concerning employment decisions based upon religious reasons, and/or
(3) the standards of conduct set forth in the teacher’s written contract and the school’s employee manual constitute bona fide occupational qualifications that she failed to meet, resulting in her lawful termination.
 - The EEOC dismissed the Charge of Discrimination.
 - No lawsuit followed.

III. **Stockdale Paradox: Reality of Threats BUT Tremendous Hope**

- A. The Paradox Explained - Jim Collins, *Good to Great* (2001)
- Jim Collins in his classic management book *Good to Great* details a concept known as the “Stockdale Paradox.”
 - The concept is named after Admiral James Stockdale, who was the highest-ranking U.S. military officer held in the “Hanoi Hilton” prisoner-of-war camp during the height of the Vietnam War.
 - Admiral Stockdale observed:

“You must never confuse faith that you will prevail in the end—which you can never afford to lose—with the discipline to confront the most brutal facts of your current reality, whatever they might be.”
- B. Concept Restated: Maintain Hope While Confronting the Brutal Facts of Current Reality
- C. Confronting the Brutal Facts of the Current Reality for Religious Ministries
1. Current Legal Environment
 - This past year First Liberty Institute handled over 600 legal matters that involved people of faith standing up when faced with threats to their religious freedom.
 - Our caseload has almost doubled the past three years (from 311 to 616).

- Suffice it to say, the threats to our religious freedom have never been as numerous or intense

2. Biden Administration's Rollback of Religious Liberty Protections

- a. U.S. Department of Education Title IX – 87 FR 41390 (07/12/2022)
 - Biden DOE proposes to expand the definition of sex under Title IX to include sexual orientation and gender identity.
- b. U.S. Department of Health & Human Services Section 1557 Rule– 87 FR 47824 (08/04/2022)
 - Biden HHS proposes implementing regulations under Section 1557 of the Affordable Care Act to prohibit discrimination on the basis of sexual orientation and gender identity and prohibiting medical providers from refusing to terminate a pregnancy.
- c. U.S. Department of Education, U.S. Department of Homeland Security, U.S. Department of Agriculture, U.S. Agency for International Development, U.S. Department of Housing and Urban Development, U.S. Department of Justice, U.S. Department of Labor, U.S. Department of Veterans Affairs, and U.S. Department of Health and Human Services Equal Treatment Rules - 88 FR 2395 (01/13/2023)
 - If a religious social welfare provider is unable to provide service to an individual, these rules will require them to give notice and referrals to the individual. Non-religious providers are not required to give the same notice and referrals.
- d. U.S. Department of Health and Human Services Health Care Conscience Rule – 88 FR 820 (01/05/2023)
 - Biden HHS proposes to rescind portions of rule specifying health care conscience rights in over two dozen federal statutes.
- e. U.S. Department of Health and Human Services Contraceptive Mandate Exemption – 88 FR 7236 (02/02/2023)
 - Biden HHS proposes to rescind portions of a rule offering exemptions to religious and moral objections to the contraceptive mandate and use Affordable Care Act user fees to provide contraceptive coverage using the Exchanges.

- f. U.S. Department of Housing and Urban Development – 88 FR 8516 (02/09/2023)
 - Biden HUD proposes to require housing grantees to prepare equity action plans, redefining sex to include sexual orientation and gender identity, under the Fair Housing Act.
- g. U.S. Department of Education Free Inquiry Rule – 88 FR 10857 (03/24/2023)
 - Biden DOE proposes to rescind regulations providing religious liberty protections to student organizations at public institutions of higher education.
- h. U.S. Department of Education Title IX Athletics Rule – 88 FR 22860 (04/13/2023)
 - Biden DOE proposes to interpret sex to include gender identity in its Title IX regulations and apply heightened scrutiny to single-sex separated athletic teams.

3. Troubling Case Law

- a. Historic Anti-Religious Freedom Precedent
 - (1) Establishment Clause Test: *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
 - Whether the government action has a secular purpose.
 - Whether the government action has the primary effect of advancing or inhibiting religion.
 - Whether the government action fosters an excessive entanglement between government and religion.
 - (2) Free Exercise Rule: *Employment Division v. Smith*, 494 U.S. 872 (1990)
 - “[I]f prohibiting the exercise of religion . . . is merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”
- b. Expansion of LGBT Rights: *Bostock v. Clayton County, Georgia*, 590 U.S. ____ (2020) (holding 6-3 that the prohibition of sex discrimination under Title VII includes homosexuality and transgender status)

[Note recognition of future issue in Justice Gorsuch’s majority opinion: “So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.”]

D. Maintaining Hope

1. Overview

- While the threats to our religious freedom have never been as numerous or intense, I truly believe our HOPE for victories preserving and advancing religious liberty has never been greater.

2. Legal Protections in Place for Religious Freedom

a. The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” US Const. amend. I.

b. Federal Law

(1) Religious Freedom Restoration Act (“RFRA”) - 42 U.S.C. § 2000bb-1

- “The [federal] government may not substantially burden a person’s free exercise of religion unless the application of the burden to the person is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest.”

(2) Religious Land Use and Institutionalized Person Act (“RLUIPA”) - 42 U.S.C. Section 2000cc

- Applies broadly to land use regulations - 42 U.S.C. §2000cc-5(5)
- Provides Four Key Protections
 - No Substantial Burden on Religious Exercise (unless compelling interest and least restrictive means) - 42 U.S.C. Section 2000cc(a)(1)
 - Treatment of Religious Less than Equal Terms with Non-Religious - 42 U.S.C. Section 2000cc(b)(1)

- No Discrimination on Basis of Religion - 42 U.S.C. Section 2000cc(b)(2)
- Totally Excludes or Unreasonably Limits Religious Assemblies - 42 U.S.C. Section 2000cc(b)(3)

c. State Law

(1) State Constitutions

(2) State RFRA in 25 States have enacted versions of RFRA:

- Alabama - Ala. Const. Am. 622
- Arizona - Ariz. Rev. Stat. § 41-1493.01
- Arkansas - 2015 SB 975
- Connecticut - Conn. Gen. Stat. § 52-571b
- Florida - Fla. Stat. § 761.01, *et seq.*
- Idaho - Idaho Code § 73-402
- Illinois - 775 Ill. Comp. Stat. § 35/1, *et seq.*
- Indiana - 2015 SB 101 (*enacted March 26, 2015*); 2015 SB 50 (*enacted April 2, 2015*)
- Kansas - Kan. Stat. Ann. § 60-5301, *et seq.*
- Kentucky - Ky. Rev. Stat. Ann. § 446.350
- Louisiana - La. Rev. Stat. § 13:5231, *et seq.*
- Mississippi - Miss. Code § 11-61-1
- Missouri - Mo. Rev. Stat. §1.302
- Montana - Mont. Code Ann. § 27-33-101, *et seq.*
- New Mexico - N.M. Stat. Ann. § 28-22-1, *et seq.*
- North Dakota – HB 1136 (*enacted in March 2023*)
- Oklahoma - Okla. Stat. tit. 51, § 251, *et seq.*
- Pennsylvania - Pa. Stat. tit. 71, § 2403
- Rhode Island - R.I. Gen. Laws § 42-80.1-1, *et seq.*
- South Carolina - S.C. Code § 1-32-10, *et seq.*
- South Dakota - SB 124 (*enacted in March 2021*)
- Tennessee - § Tenn. Code 4-1-407
- Texas - Tex. Civ. Prac. & Remedies Code § 110.001, *et seq.*
- Virginia - Va. Code § 57-2.02
- West Virginia – HB 3042 (*enacted in March 2023*)

3. Past Five Years: A Trend of Supreme Court Victories Protecting Religious Liberty
- a. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018) (holding 7-2 that the Colorado Civil Rights Commission’s actions against Christian baker Jack Phillips who refused to bake a cake for a same-sex wedding violated the Free Exercise Clause).
 - b. *American Legion v. American Humanist Ass’n*, 588 U.S. ____ (2019) (holding 7-2 that the World War I veterans memorial Bladensburg Peace Cross does not violate the Establishment Clause)
 - c. *Espinoza v. Montana Department of Revenue*, 591 U.S. ____ (2020) (holding 5-4 that the application of Montana Constitution’s no aid provision to prohibit tuition assistance to families who send their children to religious schools violated the Free Exercise Clause).
 - d. *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ____ (2020) (holding 7-2 that the ministerial exception defense derived from the Religion Clauses of the First Amendment precluded adjudication of discrimination claims made by two Catholic school elementary teachers)
 - e. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ____ (2020) (upholding 7-2 the constitutionality of the religious exemptions to Obamacare’s contraception mandate).
 - f. *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021) (holding 9-0 that Philadelphia’s refusal to contract with Catholic Social Services for foster care services unless it agreed to certify same-sex couples as foster parents violates the Free Exercise Clause).
 - g. *Shurtleff v. City of Boston*, 596 U.S. ____ (2022) (holding 9-0 that Boston’s refusal to allow a religious group to fly a Christian flag at city hall violated that group’s freedom of speech where it permitted non-religious groups to fly flags of their own choosing).
 - h. *Carson v. Makin*, 596 U.S. ____ (2022) (holding 6-3 that Maine’s exclusion of families that sent their children to religious schools from its tuition assistance program violated the Free Exercise Clause).

- i. *Kennedy v. Bremerton School District*, 597 U.S. ____ (2022) (holding 6-3 that the First Amendment’s Free Exercise and Free Speech clauses doubly protected a public school football coach’s post-game, midfield prayer and overruling a fifty-year-old anti-religious freedom precedent, *Lemon v. Kurtzman*, and its endorsement test, that courts relied upon in hundreds of cases to prohibit public expressions of faith and government support of religion, replacing it with a history and tradition analysis).

IV. Five Ways to Protect Your Ministry

A. Mission Statement

1. Key Question to Address: What is the purpose or mission of the nonprofit organization?
2. How to Secure Maximum Protection
 - In order to invoke the religious liberty protections provided under state or federal law, the organization should make clear that it is, in fact, a religious nonprofit with a religious mission or purpose.
 - The mere fact that the organization has a religious sounding name or was founded as a faith-based ministry in the past may not be enough.
 - If it is not clear that the organization is religious, then it may not be able to avail itself of all available legal protections.
3. Protection Provided
 - The U.S. Constitution, as well as local, state, and federal laws, provide protections that generally enable religious organizations, including religious schools and ministries, to operate according to their sincerely held religious beliefs. *See, e.g.*, the First Amendment to the U.S. Constitution, the federal Religious Freedom Restoration Act, and some states’ Religious Freedom and Restoration Acts.
 - The analysis will vary based on the specific context, but the U.S. Supreme Court has found faith-based mission statements to be relevant. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701 (2014).
4. More Secular or More Religious?
 - Organizations sometimes ask us whether they should become more secular or more religious.
 - It may seem obvious, but organizations can run into legal issues if they do not clearly choose an identity.

- It is the best practice for a religious nonprofit organization to embrace its religious identity, leaving no doubt that it is entitled to invoke available religious liberty protections.

5. Adoption of Mission Statement

- Adopt a mission or purpose statement that clearly explains your religious goals.
- This idea can be expressed in multiple ways.
- Simply and accurately convey your organization’s religious mission and that this mission permeates all the organization does.

6. Examples of Mission Statement

[Organization] is a 501(c)(3) religious, nonprofit organization. Our mission is to show the love of God by serving our community and meeting the physical and spiritual needs of our neighbors. All of [Organization’s] activities are designed to further this mission and ultimately to glorify God.

[School’s] mission is to provide its students with a quality education and a firm foundation in the [religious] faith. All of [School’s] activities are designed to further this mission and ultimately to glorify God.

B. Statement of Beliefs

1. Importance and Purpose

- The First Amendment and other federal laws generally protect the right of religious organizations to operate in communities that share a set of religious beliefs. *See, e.g., Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991) (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices”).
- For this reason, religious nonprofits should formally adopt a Statement of Beliefs to clearly state their core religious beliefs. This is sometimes called a Statement of Faith or a Doctrinal Statement.

3. Implementation

- Bylaws promulgate the organization’s governance rules. We generally recommend that your Statement of Beliefs should be set out in full in the Bylaws, not incorporated by reference or as a stand-alone policy.
- The decision for how to implement your Statement of Beliefs is unique to each organization and largely depends upon your goals.

- Ministries differ widely with respect to who is held accountable to faith-based standards, what those standards are, and how they are implemented.
 - For instance, some outreach-oriented nonprofits may wish to hold only their employees to their standards of faith.
 - Conversely, other nonprofits may seek to foster a close-knit community in which everyone personally adheres to the same set of beliefs as a condition of membership.
- The most important point is clarity and consistency. If you intend to hold members of community accountable for abiding by certain beliefs, be clear and upfront about what those beliefs are, what your expectations are with respect to standards regarding those beliefs, and apply those standards in a fair and consistent way.

4. What to Include in the Statement of Beliefs?

- a. Specify Core Religious Beliefs
 - It is essential to include the core religious beliefs of your religious nonprofit in the Statement of Beliefs.
- b. Address Controversial Issues of the Day
 - Clarify the organization's beliefs with respect to the most contested and controversial issues of the day, if your organization takes a position on these issues.
 - Religious beliefs related to the sanctity of life, marriage, gender, and sexual conduct are most likely to come into conflict with prevailing cultural norms, and therefore, are most susceptible to threats of litigation.
 - If the organization is denominationally affiliated, adopt the pre-existing doctrinal or theological statements of the denomination.
 - Preferable to repeat such statements in full, rather than simply adopting them by reference, for clarity.
 - By contrast, non-denominational, multi-denominational, or ecumenical organizations often will be best served by promulgating their own Statement of Beliefs to avoid ambiguity about their core beliefs.

c. Consider Inclusion of Specific Statements on:

(1) Sanctity of Life

We believe that all matters of faith and conduct must be evaluated on the basis of Holy Scripture, which is our inspired, infallible, and inerrant guide. (*2 Timothy 3:16–17*) Because Holy Scripture speaks to creation and human life, it is imperative that we correctly understand, articulate, and abide by what Holy Scripture teaches on this matter.

We believe that every human life is sacred because God has created mankind in His image and that human life begins at fertilization. We believe every human life must be recognized, respected, and protected as having the rights of a person and the inviolable right to life.

God created each person's inmost being, knitting each person together in his mother's womb. (*Psalms 139:13*) As God's individualized and personal creation, each person is fearfully and wonderfully made. (*Psalms 139:14*) God has ordained all the days of each person's life before they came to be. (*Psalms 139:16*)

We are strongly committed to the preservation and defense of unborn human life, which compels our religious, moral, and ethical duty to defend unborn human life.

(2) Marriage, Gender and Sexuality

We believe that all matters of faith and conduct must be evaluated on the basis of Holy Scripture, which is our infallible guide. (*2 Timothy 3:16–17*) Since the Holy Bible does speak to the nature of human beings and their sexuality, it is imperative that we correctly understand, articulate, and abide by what the Bible teaches on these matters.

We believe that God created mankind in His image: male and female, sexually different but with equal personal dignity. We believe that individuals should affirm their biological sex and refrain from any attempts to physically change, alter, or disagree with their biological sex. (*Genesis 1:26-28; Romans 1:26-32; 1 Corinthians 6:9-11*)

We are committed to the home and family as set forth in Holy Scripture. We believe God has ordained and created marriage to exist between one man and one woman, with absolute marital fidelity. Consequently, we believe that individuals should refrain from any sexual conduct or acts outside of this marital relationship. (*Genesis 1:27; Genesis 2:24; Matthew 19:4-6; Mark 10:5-9; Romans 1:26-27; 1 Corinthians 6:9-11; Ephesians 5:25-27; Revelation 19:7-9; Revelation 21:2*)

It is our firm conviction that we uphold the dignity of each individual as we embrace the unchanging and longstanding principles of scriptural truth.

(3) Residual Clause

(a) Purpose

- Because the Statement of Beliefs may not be able to anticipate all potential religious issues that may arise, recommend including a residual clause providing for unexpressed, material religious beliefs of the organization.

(b) Example

This Statement of Beliefs does not exhaust the extent of our religious beliefs. The Bible, as the inspired and infallible Word of God, speaks with final authority concerning truth, morality, and the proper conduct of human affairs.

(4) Statement of Final Authority

(a) Purpose

- We recommend that an organization's Bylaws identify the final human authority who will promulgate, interpret, and enforce religious policies for your religious nonprofit.
 - Often, a Board of Directors will act as this authority.

- Having a final authority specified will help resolve issues should any ambiguity arise regarding the Statement of Beliefs or Faith-based Code of Conduct.

(b) Example

For purposes of the organization's faith, doctrine, practice, discipline, and policy, the Board of Directors is the organization's final interpretive authority on the Bible's meaning and application.

(5) Contractual Voluntary-Termination Clause

(a) Purpose

- If employees are required to affirm that they personally adhere to the Statement of Beliefs, including a voluntary-termination clause provides an agreed-upon procedure in the event an employee's beliefs change.

(b) Example

I sincerely adopt this Statement of Beliefs as containing the system of doctrine taught in the Bible and agree that if at any time I find myself out of accord with this Statement of Beliefs, that I will, on my own initiative, make known to the organization's executive leadership the change that has taken place in my views since my last written affirmation of this statement of faith and, if requested, quietly and voluntarily remove myself from employment of the organization. I understand and affirm that this requirement is a material term and a condition precedent to my continued employment with the organization.

See Office of the Stated Clerk, General Assembly of the Presbyterian Church in America, *The Book of Church Order of the Presbyterian Church in America*, 24–6 (2019).

C. Employment Policies

1. Importance

- The majority of lawsuits challenging a religious nonprofit organization's right to operate in accordance with its religious beliefs occur in the employment context. Consequently, it is of the utmost importance to review and revise the organization's employment policies, found in employee contracts, handbooks, job descriptions, and codes of conduct.

2. Primacy

- Many religious organizations seek to operate in communities that share a common faith. Consequently, many ministries hold their employees to standards of conduct based upon their sincere religious beliefs.
- For these organizations, we recommend that the Statement of Beliefs and Faith-based Code of Conduct should be set out in full in employee contracts.
 - They should be on or near the first page of the employee handbook.
 - Employees should be required to sign agreement with the Statement of Beliefs before filling out applications for employment.

3. Summary of the Legal Landscape

- a. Overview of Title VII of the Civil Rights Acts of 1964 (as amended)
 - Federal law that prohibits employment discrimination on the basis of sex, race, color, national origin, and religion.
 - By a congressional amendment, the prohibition on sex discrimination also forbids pregnancy discrimination. 42 U.S.C. § 2000e(k).
 - In an opinion issued on June 15, 2020, the United States Supreme Court held that the prohibition on sex discrimination also includes a prohibition on sexual orientation and transgender status discrimination. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020) (holding "employers are prohibited from firing employees on the basis of homosexuality or transgender status").
 - Title VII presumptively applies to organizations that employ 15 or more employees. 42 U.S.C. § 2000e(b).

- b. Main Protections Afforded by Title VII for Religious Employers
- (1) The Ministerial Exception derived from the First Amendment to the U.S. Constitution
 - (2) The Statutory Religious Employer Exemption given in the text of Title VII itself
 - (3) the Religious Freedom Restoration Act.

See Bostock, 140 S. Ct. at 1754 (listing these three religious liberty protections).

[Note: There may be other available protections, such as religious organizations' general right to autonomy, their right to be free from excessive government entanglement in their affairs, and the bona fide occupational qualification statutory exception.]

- c. The "Ministerial Exception" Defense
- Available to churches, religious schools, and other religious nonprofit organizations.
 - Courts have held that it is applicable to "religiously affiliated entit[ies]" whose "mission is marked by clear or obvious religious characteristics," such as Christian college campus ministries and Jewish nursing homes. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)).
 - When it applies, the ministerial exception should provide a complete defense to federal employment discrimination lawsuits involving a religious organization's "ministers."
 - In 2012, the U.S. Supreme Court unanimously held that the First Amendment's ministerial exception protects the right of religious organizations to choose their "ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).
 - The term "minister" includes more than just the head pastor of a church. It includes any position that performs "vital religious duties," such as worship leaders and Sunday school teachers. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020).
 - Job descriptions at your organization should accurately explain the ministerial nature of all positions that perform vital religious duties.

- d. Title VII Statutory Religious Employer Exception
- The second defense is a statutory defense based in Title VII itself, available to most religious nonprofits.
 - The first question a court will ask is whether your organization is eligible to assert the defense.
 - The leading case from the Ninth Circuit, *Spencer v. World Vision, Inc.*, states that an entity is eligible for the religious exemption under Title VII if “it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011).
 - At least one federal appellate court takes a different approach, instead considering a variety of factors in a balancing test. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (considering “whether [the organization] is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue . . . whether the entity holds itself out to the public as secular or sectarian . . . whether the entity regularly includes prayer or other forms of worship in its activities.”).
 - The precise analysis may depend on the details of your ministry and the applicable law in your location.
 - When it applies, the statutory religious employer exemption in Title VII provides that religious organizations may consider religion while making employment decisions in order to make sure that they employ only people who can carry out their religious mission. 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 2000e-2(e)(2).
 - It is widely recognized that this provision provides a complete bar to any lawsuits claiming discrimination on the basis of religion for any position in the organization – whether or not the position is considered ministerial. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987).
 - That means that Christian nonprofit organizations generally are free to hire only Christians, or to prefer Christians in hiring, and these organizations cannot be sued for religious discrimination.

- There is debate over whether this statutory provision also provides a defense to claims of sex discrimination where the religious organization’s employment decision is based on the employee’s failure to live up to the organization’s Statement of Beliefs or Faith-based Code of Conduct on issues of sexual morality.
 - Because this is a potential line of defense, if your organization maintains a Faith-based Code of Conduct, it should include clear standards regarding moral transgressions that could lead to adverse employment actions, applying them consistently and equally.

- e. The Religious Freedom Protection Act (“RFRA”), 42 U.S.C. § 2000bb-
 - provides protections for religious organizations.
 - prohibits the federal government from imposing a substantial burden on religious exercise unless it can demonstrate a compelling reason for its action that is narrowly tailored to be the least restrictive means of achieving its goals.

- 4. Recommended Policies to Adopt and Document
 - a. Employment Non-Discrimination Policy Statement
 - (1) Guidance
 - When choosing an employment non-discrimination statement to include in an employee handbook, most generic examples you will find have not been formatted for religious employers.
 - Although one should not be able to waive your First Amendment rights, it is preferable to state the employment non-discrimination policy in a way that does not purport to waive any religious liberty rights.
 - The employment non-discrimination statement should be consistent wherever it appears.
 - This language may need to be adjusted depending upon any applicable state or local employment non-discrimination laws.

(2) Example

All employment decisions of [Organization] are made to further [Organization's] mission to [Mission Statement]. [Organization] is an equal opportunity employer and does not discriminate on any basis covered by applicable law. As a nonprofit faith-based employer, [Organization] reserves the right to carefully and fully explore the religious values, faith, personal conduct, and convictions of applicants and employees in order to employ only those individuals who support, advance, and live in a manner consistent with our Statement of Beliefs and Faith-based Code of Conduct.

b. Ministerial Job Descriptions

(1) Key Legal Principles

- The First Amendment protects the right of religious organizations to make employment decisions with respect to who leads the ministry and who conveys the faith. *Hosanna-Tabor*, 565 U.S. at 193; *Our Lady of Guadalupe*, 140 S. Ct. at 2066.
- Constitutional religious liberty protections are at their strongest with respect to “ministerial” positions. *Id.*
 - Essentially, because “ministers” are responsible for conveying the tenets of the faith, religious organizations are free to choose whoever they want to be a minister and that decision cannot be scrutinized by courts.
 - Therefore, the First Amendment protects the employment relationship between a church and its minister from government intrusion and bars many employment related lawsuits.
- The protection applies to more than just a minister or pastor at a church, including:
 - teachers at Christian schools. *Hosanna-Tabor*, 565 U.S. at 190-191.
 - the music director at a church. *Cannata v. Cath. Diocese of Austin*, 700 F.3d 169, 170 (5th Cir. 2012).
 - an organist at a church. *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019).
 - a chaplain at a faith-based hospital. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 418 (2d Cir. 2018).

- a spiritual director at an Interservice campus ministry. *Conlon*, 777 F.3d at 834-35.
- Note: Other leaders at nonprofit religious organizations who perform vital religious duties also should be considered ministers.

(2) Determining Who Qualifies as a Minister

- To decide who qualifies as a “minister,” courts may consider several factors, such as an employee’s title, religious training, and credentials, but the most important factor is “what an employee does” — whether they are responsible for performing “vital religious duties.” *Our Lady of Guadalupe*, 140 S. Ct. at 2064, 2066.

(3) Importance of Accurate & Specific Job Descriptions

- Your organization should carefully review your job descriptions and employment criteria to ensure that ministerial positions accurately and sincerely reflect as many ministerial factors as possible.
- When a position has religious duties or responsibilities, those should be included and explained in the job description.
- The more specificity with respect to religious duties, training, credentials, and other religious job requirements (including faith-based character requirements), the stronger the argument that the position is ministerial.

(4) Note of Caution: It is unlikely that courts would consider all employees of a religious organization to be ministers. If an organization claims that every position is ministerial, including janitorial positions, such claims could undermine its credibility.

c. Faith-Based Code of Conduct for Employees

- Religious organizations differ in how to approach moral issues. If an organization intends to hold its employees to a Faith-based Code of Conduct, it is recommended that these requirements are clearly specified in advance.
- Requiring employees to agree to abide by a faith-based code of conduct each year has several advantages:
 - Fair and clear expectations provided up front
 - Deters ill-suited applicants from applying

- Helps ensure that a consistent procedure is followed in case of violations
- Provides proof of the faith-based tenets of the organization
- Because federal law often allows faith-based organizations to make employment decisions consistent with their religious tenets, having these standards clearly stated and consistently applied provides a strong defense.
- Moral standards, such as a prohibition on non-marital sexual conduct, should be applied equally to male and female employees.
- The faith-based code of conduct should be enforced consistently to avoid even the appearance of a double standard.
- The faith-based code of conduct should be grounded in the organization's Statement of Beliefs and should establish parameters for acceptable behavior.
- Such a code should include a preamble addressing the religious motivation for behavior addressed in the code using supporting scriptures, doctrines, and statements of faith.

d. Alternative Dispute Resolution

(1) Purpose

- Employment agreements should set forth a procedure for resolving disputes, such as requiring alternative dispute resolution (ADR) in the form of mediation and binding arbitration rather than litigating in civil courts.
- Examples for Christian forums for this kind of dispute resolution include the Institute for Christian Conciliation, Peacemaker Ministries.

(2) Example

The Parties must resolve any dispute, controversy, or claim arising out of or relating to this Agreement (the "Dispute") under the procedures and provisions set out in this Agreement. Those procedures and provisions are the exclusive mechanism for resolving any Dispute between the Parties.

Notice. A party must send written notice of any Dispute to the other party. The Parties must then consult and negotiate in good faith in an attempt to resolve the Dispute set out in the Dispute Notice. If the Dispute is not resolved promptly, the Parties must then consult and negotiate in good faith in

an attempt to resolve the Dispute set out in the Dispute Notice at an in-person meeting at a mutually agreeable place and time.

Mediation and Arbitration. If the Parties do not resolve the Dispute within 7 business days after the in-person meeting, the Parties must proceed to mediation and, if necessary, to legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation (complete text of the Rules is available at www.iccpeace.com). Judgment upon an arbitration decision may be entered in any court of competent jurisdiction.

Waiver and Attorney's Fees. The Parties waive their right to a jury trial and to file a lawsuit in any civil court against each another for any Dispute, except to enforce an arbitration decision. If a party files a civil lawsuit except to enforce an arbitration decision, and the other party successfully compels arbitration regarding the Dispute, the compelling party is entitled to recover its reasonable and necessary attorney's fees and court costs for having had to compel arbitration.

Survival. The obligations of this section survive the expiration or termination of this Agreement.

- e. Non-Employee Volunteers
 - Religious organizations should strongly consider requiring volunteers to sign an agreement to adhere to the organization's written conduct policies and Statements of Beliefs.

D. Facilities Use Policies

- 1. Recommendation
 - Facility use policies should explain that everything that an organization does, including the use of its facilities, is a part of its broader religious mission and must be in accordance with the organization's religious purpose.

2. Cautions

- In some jurisdictions, when private religious organizations open their facilities to use for the general public, such as for use as a polling place or renting out facilities during the weekend, that activity may be considered a public accommodation.
 - The analysis will vary widely by state. If your organization rents its facilities for a fee, it may be advisable to rent at cost or at below market rates.
 - In some jurisdictions, the more a rental is seen as a profit-seeking enterprise rather than a faith-based endeavor, the more likely a court may consider the activity to be subject to regulation. *See Doe v. Cal. Lutheran High Sch. Ass'n.*, 88 Cal. Rptr. 3d 475, 482-83 (Cal. Ct. App. 2009) (concluding that faith-based school was not a place of public accommodation, but some nonprofit organizations could be subject to the state's law).

3. Use Limitations

- In light of these possibilities, religious organizations should consider adopting facility use policies that limit the use of their facilities only to uses that accord with the organization's religious tenets.
 - A religious organization may specify that its facilities are not open to the general public and that its facilities may not be used in ways that conflict with its religious or moral teachings.
 - Consider including a signature block in facility use rental agreements acknowledging receipt, review, and assent to all policies, including the Statements of Beliefs.
- Alternatively or additionally, a religious organization may wish to limit its facilities to particular specified uses.
 - For instance, a religious organization may implement a policy that only enables members to rent its facilities.

E. Government Funding

1. Counting the Cost

- Religious charities and nonprofit organizations often question whether they should seek government grants or contracts in pursuit of their community service goals.
- Faith-based organizations are often well-positioned to provide valuable services for people in need of all backgrounds, and this funding could multiply their efforts to assist the vulnerable.

- However, religious charities should be aware that government funding often comes with additional conditions and restrictions that are not applicable to organizations that do not receive government funding.
- At the federal level, restrictions on faith-based organizations often change with changes between presidential administrations.
- State and local governments may impose different restrictions on organizations they fund. These restrictions should be carefully considered before accepting government funding.

2. Federal Government Grants

- Religious non-profits seeking grants may be able to invoke the Free Exercise Clause of the U.S. Constitution to avoid being excluded from grant programs to which they would otherwise be eligible.
- The Free Exercise Clause prohibits the government from discriminating against or disfavoring religious organizations on the basis of religion.
- Consequently, the government may not deny “a generally available benefit solely on account of religious identity [imposes a penalty on the free exercise of religion]” unless the government can prove that doing so is necessary to further a compelling interest of the highest order. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).
 - For example, in the *Trinity Lutheran Church* case, the U.S. Supreme Court held that excluding a church from a government grant program that would fix children’s playgrounds based on the church’s religious identity was unconstitutional religious discrimination. *Id.* at 2024-25.
- Government grants generally cannot directly fund religious activities under the Establishment Clause. To be eligible for grant programs, religious organizations will likely be required to separate their “inherently religious activities,” such as religious worship, prayer, or studying of religious texts, from government funded activities. See Department of Justice, *DOJ Faith-based and Community Initiatives FAQ*.

3. Federal Government Contracts

- Contracting with the federal government is subject to different requirements than receiving federal grant funds.

- All federal contractors are required to abide by the federal government’s employment non-discrimination requirements.
 - Executive Order 11246, as amended, prohibits federal contractors from discriminating against employees on the basis of “race, color, religion, sex, sexual orientation, gender identity, or national origin.” Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(1), *as amended* (July 21, 2014).
 - Executive Orders are issued by the President and enforced by regulations issued by the President’s administration.
 - Thus, the interpretation of this Executive Order could change with different administrations.
 - Importantly, Executive Order 11246 contains an exception for religious organizations. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 204(c), *as amended* (Dec. 16 2002), reads “Section 202 . . . shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”
 - This religious exception mirrors the language of the religious exception in Title VII of the Civil Rights Act of 1964, which is the federal non-discrimination law applicable to most employers in the country. The language of Executive Order 11246 should be interpreted similarly.
 - Under both Executive Order 11246 and Title VII of the Civil Rights Act of 1964, it is widely accepted that religious organizations can make employment decisions on the basis of religion.
 - For example, Jewish nonprofit organizations are free to hire only Jewish employees without being disqualified as a federal contractor.
 - However, like in Title VII, there is ambiguity over whether religious federal contractors may make employment decisions based upon their religious beliefs about issues of sexual morality.

4. Two 2022 Supreme Court Victories provide further support for religious non-profits full participation in neutral government funding programs, both in receiving grants and participating in contracts.

a. *Carson v. Makin*, 596 U.S. ____ (2022)

(1) Overview

- In a precedent-setting victory, the Supreme Court ruled in favor of Maine parents, where the state denied their participation in a tuition assistance program because they sought to send their children to religious schools that were actually religious.

(2) Holding

- In a 6-3 decision authored by Chief Justice Roberts, the Court held that Maine’s exclusion of families that sent their children to religious schools violated the Free Exercise Clause because it discriminated against them.
- In finding this constitutional violation, the Court reiterated the “unremarkable principle” that “a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.”

(3) Impact

- *Carson* is a major victory for school choice, not just in Maine, but across the nation.
- Moreover, this cases establishes strong precedent that the government cannot discriminate against or otherwise deny available benefits to people of faith and faith-based organizations simply because they are religious.

b. *Kennedy v. Bremerton School District*, 597 U.S. ____ (2022)

(1) Overview

- In a significant religious liberty victory, the Supreme Court ruled in favor of former Bremerton High School football coach Joe Kennedy finding that the school district violated Coach’s constitutional rights when it terminated him for praying at the 50-yard line after every game.

- In its 6-3 landmark decision authored by Justice Gorsuch, the Court found that the First Amendment's Free Exercise and Free Speech clauses doubly protected the Coach's post-game, midfield prayer. "Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance."
- Moreover, the Court rejected the school district's claim that permitting the Coach's prayer would violate the Establishment Clause.

(2) Establishment Clause Analysis

- The Court observed that the Establishment and Free Exercise "Clauses have 'complementary purposes, not warring ones where one Clause is always sure to prevail over the others.'"
- The Court rejected the school district's argument that "the Establishment Clause is offended whenever a 'reasonable observer' could conclude that the government has 'endorse[d] religion.'" The school district argued "that a 'reasonable observer' could think it 'endorsed Kennedy's religious activity by not stopping the practice.'"
- In rejecting the school district's Establishment Clause justification, the Court overruled a fifty-year-old anti-religious freedom precedent, *Lemon v. Kurtzman*, and its endorsement test, that courts relied upon in hundreds of cases to prohibit public expressions of faith and government support of religion.
- "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (citing *Town of Greece and American Legion*)
- The Court also rejected the school district's "backup [Establishment Clause] argument" that Kennedy's conduct constituted coercion since "[t]he evidence cannot sustain it."

- “There is only the ‘mere’ shadow of conflict, a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity’s concerns about phantom constitutional violations justify actual violations of an individual’s First Amendment rights.’]

(3) Seven Losses, before SCOTUS victory

- **LOSS 1:** Federal District Court denies preliminary injunction (2016)
- **LOSS 2:** Ninth Circuit panel affirms District Court (2017)
- **LOSS 3:** Ninth Circuit denies en banc rehearing (2018)
- **LOSS 4:** U.S. Supreme Court denies cert petition (2019) [with four justices joining statement]
- **LOSS 5:** District Court grants Summary Judgment (2020)
- **LOSS 6:** Ninth Circuit panel affirms District Court (2021)
- **LOSS 7:** Ninth Circuit denies en banc rehearing (2021)
- **WIN 1:** U.S. Supreme Court reverses and grants summary judgment to Kennedy (June 27, 2022)

(4) Kennedy impact on Establishment Clause Jurisprudence

- *Kennedy* calls into question hundreds of cases that relied upon the now-overruled *Lemon* case and its endorsement test.
- This provides a tremendous opportunity to revisit those cases which used *Lemon* to strike down public expressions of faith (*e.g.*, veterans memorials with religious imagery, Ten Commandments displays, and public prayer) and government funding of and/or provision of government benefits for religious individuals and organizations.

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(1) Overview

- In a precedent-setting victory, the Supreme Court ruled in favor of our clients, Maine parents, where the state denied their participation in a tuition assistance program because they sought to send their children to religious schools that were actually religious.

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- In a 6-3 decision authored by Chief Justice Roberts, the Court held that Maine's exclusion of families that sent their children to religious schools violated the Free Exercise Clause because it discriminated against them.
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- *Carson* is a major victory for school choice, not just in Maine, but across the nation.
- Moreover, this case establishes strong precedent that the government cannot discriminate against or otherwise deny available benefits to people of faith and faith-based organizations simply because they are religious.

V. Conclusion

A. Concluding Observations

1. The Call to Ministry

“We are not simply to bandage the wounds of victims beneath the wheels of injustice; we are to drive a spoke into the wheel itself . . . Silence in the face of evil is itself evil; God will not hold us guiltless. Not to speak is to speak. Not to act is to act.” – Dietrich Bonhoeffer

2. The Call to Action

- Despite the reality of threats, the Lord has provided Religious Ministries with a window of opportunity to walk boldly in their exercise of religious freedom.
- To do so, as I’ve discussed today, we must be proactive in securing that freedom by taking steps to guard our religious ministries.

3. Thank you for the opportunity to be with you today.

- At First Liberty, we are committed to assisting you.
- For more information, you may go to firstliberty.org.

B. Questions and Answers